

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN L WHEELER; GLORIA A WHEELER, NO C 08-3230 VRW

Plaintiffs,

ORDER

v

BANK OF AMERICA NT and SA;
LIBERTY REVERSE MORTGAGE; SEATTLE
FINANCIAL GROUP,

Defendants.

On February 12, 2009, the court continued the stay in this matter pending the resolution of Miller v Bank of America NT and SA, 46 Cal 4th 630 (2009) ("Miller").

On June 1, 2009, the Supreme Court of California issued its decision in Miller. The court concluded that Bank of America's practice of balancing customers' accounts by applying account credits against account debits does not violate California law. 46 Cal 4th at 638-44.

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1 On August 17, 2009, the court ordered plaintiffs to show
2 cause why this action should not be dismissed in light of the fact
3 that their complaint challenges the same banking practices that the
4 supreme court has found to be legal. Doc # 43. In response,
5 plaintiffs failed to acknowledge Miller or argue why their claims
6 should be able to proceed. Doc # 45 at 1-4. Instead, plaintiffs
7 list dates and times of various transactions and state that
8 "Plaintiffs have different causes of action: FRAUD, DEFAMATION,
9 BREACH OF OBLIGATION 3294, FORGERY, [and] NEGLIGENCE." Id.

10 As an initial matter, the court does not consider
11 plaintiffs' response regarding forgery and breach of obligation
12 because plaintiffs' complaint does not include such causes of
13 action.

14 Plaintiffs' complaint consists of five claims: (1) fraud
15 under California civil code ("civil code") sections 1709 and 1710;
16 (2) negligent misrepresentation under civil code sections 1709 and
17 1710; (3) violation of civil code section 704.080; (4) intentional
18 infliction of emotional distress; and (5) defamation. Plaintiffs'
19 first, second, third and fourth causes of action challenge
20 precisely the same banking practices that the supreme court found
21 legal in Miller. 46 Cal 4th at 639-45. Indeed, much of
22 plaintiffs' complaint is taken verbatim from the complaint in
23 Miller. Doc ## 47-1 at 2-12; 47-2 at 10-20. Because the supreme
24 court found these challenged bank practices to be legal, plaintiffs
25 cannot state a claim under California law for claims one through
26 four.

27 Plaintiffs' claim for defamation, while not addressed
28 specifically in Miller, also fails. To state a claim for

1 defamation under California law, a plaintiff must show "an injury
2 to reputation" that occurs "by means of libel or slander."
3 Nguyen-Lam v Cao, 171 Cal App 4th 858, 867 (2009) (citation
4 omitted). Both libel and slander require a showing of falsity.
5 Shively v Bozanich, 31 Cal 4th 1230, 1242 (2003) ("[A] written
6 communication that is false * * * that exposes a person to contempt
7 or ridicule or certain other reputational injuries, constitutes
8 libel. A false and unprivileged oral communication attributing to
9 a person specific misdeeds or certain unfavorable characteristics
10 or qualities, or uttering certain other derogatory statements
11 regarding a person, constitutes slander.") (citations omitted).

12 Plaintiffs' defamation claim alleges: First, that "by
13 failing to remove the negative entries on plaintiffs' credit card
14 reports," Bank of America defamed plaintiffs. Doc # 47-1 at 13.
15 Second, "Bank of America reported to Chex Systems that plaintiffs
16 were writing bad checks on insufficient funds." Id at 14. Third,
17 plaintiffs were turned away when they tried to open a checking
18 account with "Bank of the West." Id. Last, plaintiffs contend
19 that they suffered damages as a result of "this defamation." Id.

20 Plaintiffs' defamation allegations therefore are based on
21 the propriety of Bank of America asserting certain bank fees
22 against plaintiffs' account. To put it simply, if the bank fees
23 assessed to plaintiffs were proper, the reporting of such
24 information to Chex Systems cannot be deemed "false." Such is the
25 holding of Miller. Because the supreme court has ruled that the
26 fees at issue are proper, the mere reporting of this truthful
27 information cannot be the basis for a defamation claim under
28 California law.

1 Because plaintiffs' complaint does not state a claim
2 that survives Miller, it is DISMISSED.
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4 IT IS SO ORDERED.



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7 VAUGHN R WALKER
8 United States District Chief Judge
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